

CLERK'S COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

GARRY NICHOLS,

Applicant,

v.

JOE WILLIAMS, et al.,

Respondents.

No. CIV-00-0789 JP/LCS

FILED

UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

JUN 27 2000

R. J. March
CLERK

MEMORANDUM OPINION AND ORDER OF DISMISSAL

This matter is before the Court on Applicant's "Objections to the Magistrate's Order to Show Cause" (Doc. #7) filed June 16, 2000, and motion for injunction (Doc. #8) filed June 16, 2000. In the order, the Magistrate Judge *sua sponte* raised the issue of Applicant's failure to exhaust available state court remedies and directed Applicant to show cause why the § 2241 application should not be dismissed. In summary, Applicant's response asserts that the Court erred by raising exhaustion without requiring an answer from Respondents and that exhaustion is unnecessary in this case. The motion for injunction asks that similar claims by other inmates not be joined with Applicant's case. For the reasons below, the show cause order will be sustained and the habeas corpus application will be dismissed.

First, the Court properly raised exhaustion *sua sponte* as a preliminary matter. As stated by the Court of Appeals for the Tenth Circuit, "we have discretion to raise comity [exhaustion] issues *sua sponte*." *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991), *quoted in Hardiman v. Reynolds*, 971 F.2d 500, 503 (10th Cir. 1992); *and see Munn v. Ward*, No. 98-6207, 1998 WL 764651 (10th Cir. 1998) (same); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987) (exhaustion may be raised on appeal even if not raised in the district court). This argument does not aid Applicant's cause.

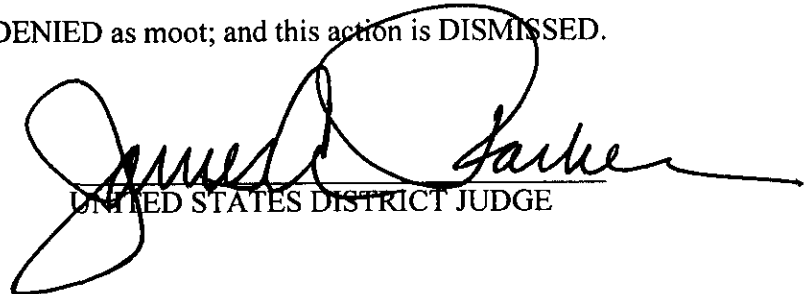
Second, Applicant argues "exhaustion is unnecessary in the instant case because Petitioner has raised claim(s) implicating important state interests." Necessity, however, is not a governing factor in

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this analysis. The exhaustion requirement “is based on principles of comity; exhaustion is not jurisdictional,” *Harris v. Champion*, 15 F.3d 1538, 1554 (10th Cir. 1994), and “comity involves a delicate compromise of both state and federal concerns.” *Carter v. Estelle*, 677 F.2d 427, 442 (5th Cir.1982), *quoted in Hardiman*, 971 F.2d at 503. Here, as even Applicant asserts, the state clearly has a strong interest in resolving issues arising from its own prison system, and the Court will not presume that the state courts of New Mexico are unavailable or incompetent to adjudicate Applicant’s claims. *See Steele v. Young*, 11 F.3d 1518, 1523 (10th Cir. 1993). This argument does not support Applicant’s request to excuse exhaustion. As a result of the decision reached herein, Applicant’s motion for injunction and all other pending motions will be denied as moot.

IT IS THEREFORE ORDERED that Applicant’s motion for leave to proceed under 28 U.S.C. § 1915 (Doc. #2) is GRANTED;

IT IS FURTHER ORDERED that Applicant’s application for writ of habeas corpus under 28 U.S.C. § 2241 is DISMISSED without prejudice; and the motion for injunction (Doc. #8) filed June 15, 2000, and all other pending motions are DENIED as moot; and this action is DISMISSED.



UNITED STATES DISTRICT JUDGE